Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-167

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

EDWARD WRIGHTING, JR.,
Petitioner,

vs.

THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a petition for writ of certiorari is timely when it was filed more than six months after the Alameda County Superior Court, Appellate Department, denied an application for certification to the California Court of Appeal, which denial marked the end of petitioner's appellate rights.

2. Whether denial of a court reporter at a misdemeanor jury trial violates some federal right when an alternate method of providing an appellate record is available, and was used, and when indigent and non-indigent defendants are treated alike.

3. Whether any federal right was infringed by prosecutorial misconduct.

4. Whether the California system of appeal from a misdemeanor conviction violates a federal right, when a meaningful right to

appeal exists, and when indigent and nonindigent defendants are treated alike.

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OPINIONS BELOW

There are two separate actions involved. First is the criminal proceeding which began in the Municipal Court of California, County of Alameda. Petitioner's conviction in that case was affirmed in an unreported opinion of the California Superior Court, County of Alameda, Appellate Division, on January 16, 1980. Petition, Appendix D.

The Appellate Department denied an application for certification to the Court of Appeal on January 31, 1980. Petition, Appendix C. This was the court of last resort for petitioner in that matter. See the Argument, below.

The second action was a civil writ of mandate challenging the criminal conviction commenced by petitioner in the California Court of Appeal, First Appellate District, Division Four. This was denied in an unreported opinion on April 10, 1980. Petition, Appendix A. The California Supreme Court denied hearing on May 8, 1980. Petition, Appendix B.

JURISDICTION

The petition was not timely filed. Jurisdiction is invoked under 28 U.S.C. 1257(3). However, petitioner had exhausted all appellate rights when certification to the Court of Appeal was denied on January 31,

1980. This was the court of last resort for petitioner in the criminal matter. This will be discussed further in the Argument, below.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The constitutional provisions, statutes, and rules involved are set forth in the petition.

STATEMENT OF THE CASE

On September 14, 1976, petitioner was charged in the Alameda County Municipal Court with violation of California Vehicle Code section 23102(a), driving under the influence of alcohol, a misdemeanor. Petition, page 4. Petitioner's motion to have a court reporter at the trial was denied. Petition, page 5. Jury trial was held on December 6 and 7, 1977, resulting in a guilty verdict. Petition, pages 5, 9. Petitioner appealed, and each party filed a proposed settled statement. Thereafter, on

September 7, 1978, the trial court filed a settled statement. Petition, page 9. On January 6, 1980, the Alameda County Superior Court, Appellate Department, affirmed the conviction. Petition, page 11. The Appellate Department denied an application to have the case transferred to the California Court of Appeal on January 31, 1980. Petition, pages 11-12. This exhausted petitioner's appellate rights. Petition, page 12; see also below.

Petitioner commenced the second action by filing a petition for a writ of mandate in the California Court of Appeal. This was denied on April 10, 1980. Petition, Appendix A. The California Supreme Court denied hearing on May 8, 1980. Petition, Appendix, B. The instant petition followed.

The facts concerning the alleged misconduct will be discussed in the Argument, below.

REASONS FOR DENYING THE WRIT

A. Timeliness of the Petition

When petitioner's application to have the case transferred to the court of appeal was denied on January 31, 1980, the appellate division of the court of appeal became the court of last resort for petitioner. Talley v. California (1960) 362 U.S. 60, 62; Whittaker v. Superior Court (1968) 68 Cal.2d 357, 365, 438 P.2d 358, 66 Cal.Rptr. 710; Burrus v. Municipal Court (1973) 36 Cal.App.3d 233, 238, 111 Cal.Rptr. 539; California Rules of Court, Rule 62. Thus petitioner was required to file the petition within 90 days of that date. He did not. Rules of the Supreme Court, Rule 20.1. Petitioner attempted to create a state appellate right where none existed by filing a collateral civil mandamus petition challenging his conviction in the higher appellate courts. The denial of these

discretionary writs should not reconfer on this Court a jurisdiction which had already expired.

Petitioner contends the California appellate procedure for misdemeanor convictions is inadequate. This meritless contention will be discussed below. However, even were this so, the fact remains that this petition is untimely. A federal question may have been involved concerning the validity of the California appellate procedure, if the petition had been timely filed; no federal question is involved in the denial of a discretionary civil writ.

B. The Merits

The rulings in this case do not conflict with any decisions of this Court or of any other court that we are aware of, nor is any substantial federal question involved. This is because there exists in California adequate review in misdemeanor convictions

and, more to the point, no unequal treatment based on indigency.

1. The absence of a court reporter

In People v. Goudeau (1970) 8 Cal.App.3d 275, 87 Cal.Rptr. 424, the court considered the validity of having no court reporter in misdemeanor cases in light of Williams v. Oklahoma City (1969) 395 U.S. 458; and Griffin v. Illinois (1956) 351 U.S. 12. The court correctly found that the "wealth of the defendant is . . . not relevant to the presence of a reporter . . . ." People v. Goudeau, 8 Cal.App.3d at 280. The court also found the use of a settled statement provided an adequate alternative to the use of a reporter's transcript. 8 Cal.App.3d at 280-282. This state court interpretation of state law should be given careful consideration. Reitman v. Mulkey (1967) 387 U.S. 369, 376-379. Because of this the court

properly distinguished the two decisions of this Court referred to previously and found no federal right was violated. Recently the California Supreme Court also impliedly approved this system. In re Kathy P. (1979) 25 Cal.3d 91, 102, 599 P.2d 65, 157 Cal.Rptr. 874.

The line of cases primarily relied upon by petitioner were concerned with differing treatment based upon wealth. E.g., Mayer v. City of Chicago (1971) 404 U.S. 189, 195:

> "[T]he State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way."

Here a non-indigent, such as petitioner, and an indigent are treated exactly alike.

Petitioner engages in a classic piece of circular reasoning on this point. He argues that this Court in Mayer required indigents have certain transcripts because non-indigents could have them. Thus, he argues, in California the non-indigent must have the transcripts because indigents are required under Mayer to have them. Petition, pages 26-27. In reality, this Court requires only that there be no discrimination between rich and poor. Here there is none.

2. The alleged misconduct

Petitioner exaggerates the inconsistancies between the proposed settled statements of the parties, and the settled statement prepared by the court. During defense closing argument the defense argued he was presumed innocent. The district attorney objected, stating the defendant was no longer presumed innocent because the trial was over. The court upheld this, stating to

defense counsel: "Counsel, you are misstating the law." There was further discussion about this. See the two proposed settled statements and the settled statement.

One may well ask, if the defendant is still presumed innocent after all the evidence has been presented to the jury, when is the prosecution ever going to overcome the presumption. The defendant is presumed innocent when the trial began. At some point during the giving of evidence the presumption must be overcome if the prosecution is to prevail. But such semantic quibbles do not constitute a federal question. The jury knew the defendant was presumed innocent at the beginning of trial. The defense was entitled to argue the presumption had not been overcome; the prosecution that it had been. This was clear to the jury. Compare Donnelly v. DeChristoforo (1974) 416 U.S. 637, 646-647.

3. Misdemeanor appeals

In California a convicted misdemeanant has a right to appeal to the appellate department of the superior court. There is further appellate review only if the appellate department certifies the matter. Whittaker v. Superior Court, supra, 68 Cal.2d at 365; California Rules of Court, Rules 62, 63. Petitioner claims this is unconstitutional.

It is settled that there is no federal constitutional right to state appellate review of state criminal convictions. Griffin v. Illinois, supra, 351 U.S. at 18; Rinaldi v. Yeager (1966) 384 U.S. 305, 310; Ross v. Moffitt (1974) 417 U.S. 600, 611. Petitioner claims however, that the distinction drawn between those charged with misdemeanors and those charged with more serious felonies violates a federal right. However, a state may constitutionally provide

more favorable appellate procedures for those facing more serious punishment than it provides those facing less serious punishment. Estelle v. Dorrough (1975) 420 U.S. 534, 539-540. The California system of limited appellate review of misdemeanor cases does not violate any federal right.

CONCLUSION

For the reasons stated, the People of the State of California respectfully request that this Court deny the petition.

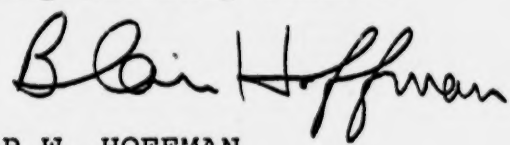
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